No. 92-929

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

METROPOLITAN SCHOOL DISTRICT OF
WAYNE TOWNSHIP, MARION COUNTY, INDIANA, on
behalf of itself and
all others similarly situated,
Petitioner,

v.

ROBERT R. DAVILA, Assistant Secretary,
Office of Special Education and
Rehabilitative Services,
United States Department of Education,
Respondent,

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION, INC. THE NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION THE COUNCIL FOR EXCEPTIONAL CHILDREN THE COUNCIL OF ADMINISTRATORS OF SPECIAL EDUCATION

IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI

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January 28, 1993

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INTEREST OF THE *AMICI CURIAE*

The National Association of State Directors of Special Education, Inc. ("NASDSE") is a nonprofit organization representing state education agencies and their administrators, who are directly responsible for directing, coordinating and supervising education programs for children with disabilities. Its members include State Columbia, Puerto Rico, the Bureau of Indian Affairs, and the Pacific agency administrators in each of the 50 states, the District of jurisdictions.

The National Association of State Boards of Education ("NASBE") is a nonprofit, private association that represents state and territorial boards of education in 47 states and territories. Its principal objectives are to strengthen state leadership in education policymaking; promote excellence in the education of all students; advocate equality of access to educational opportunity; and assure responsible lay governance of public education.

The Council for Exceptional Children ("CEC") is the largest professional organization in the United States of educators actively serving children with disabilities. CEC participates as *amicus* because of its members' concern that the mechanisms for goals established by the Individual with Disabilities Act ("IDEA") be discharged properly.

The Council of Administrators of Special Education ("CASE"), a division of CEC, is a nonprofit organization representing local administrators of special education responsible for administering and supervising programs for children and youth with disabilities in local school districts. CASE was founded in 1952 and its over 5,000 members include state administrators and trainers of administrators, but are primarily local administrators in all 50 states, the District of Columbia, Puerto Rico, the Bureau of Indian Affairs, and Guam.

STATEMENT

All of the state and local education agencies ("SEAs" and "LEAs") represented by *amici* receive Federal financial assistance under the grant program established by Part B of the Individuals with Disabilities Education Act ("IDEA/B", formerly the Education of the Handicapped Act, "EHA"), 20 U.S.C. § 1411 *et seq.* In the 1992-93 school year, these funds amount to $1,976,095,000. These funds are initially distributed by the U.S. Department of Education ("the Department") to SEAs; a minimum of 75% is redistributed ("flowed through") to LEAs. To qualify for these funds, the SEAs and the LEAs must satisfy the requirements of Part B, and the regulations implementing those statutes, 34 C.F.R. Part 300, as administered by the Department's Office of Special Education and Rehabilitative Services ("OSERS"). This grant program is directly administered by the Office of Special Education Programs ("OSEP", previously called the Office of Special Education ("OSE") and, prior to that, the Bureau of Education of the Handicapped("BEH")), which necessarily involves a close working relationship with *amici* and their respective members.

OSEP disburses Part B funds after receiving from an SEA and approving a state plan that meets the extremely detailed requirements of IDEA, §§ 1412-13 and the implementing regulations. Similarly, LEAs must meet the requirements of IDEA, § 1414 and the implementing regulations before they receive funds from an SEA. SEAs and LEAs receive technical assistance on meeting these requirements through OSEP's monitoring process (on-site inspections and discussions with SEA and LEA personnel, parents, advocates and others), comments on the grant applications and explanatory documents.

The explanatory documents issued by OSEP fall into two broad categories: formal[1] and informal. The formal documents

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[1] The Department's formal policy making documents are quite limited in number. They consist of: (1) Appendix C to 34 C.F.R. 300, a series of detailed questions and answers interpreting the requirements concerning individual

(continued...)

are disseminated either by publication in the Federal Register or direct distribution to various mail lists. The informal documents consist primarily of correspondence between OSERS or OSEP and the general public, including members represented by *amici*. This correspondence is generated when OSERS or OSEP receives a request to interpret IDEA/B or its regulations. A response may be given by OSERS or OSEP and is transmitted only to the person who has submitted the request. There is no prescribed dissemination or compilation of this correspondence. The "New Letter" that is the subject of this proceeding is an example of this correspondence.[2] It was written in response to an inquiry by Frank E. New, then-Director of the Ohio Division of Special Education concerning the application of State suspension and expulsion policies under IDEA/B.

Amici participate in this proceeding because of their members' concern about the process underlying the New Letter. None of the *amici* take a position at this time on the merits of the position expressed in that letter; their sole interest is procedural. *Amici* do not, of course, urge that the Department has no authority to issue these letters. *Amici* object, however, to the Department's attempt to impose new, broad obligations upon every school district in the Nation, in the absence of statutory authority and without following the rulemaking procedures established by Congress, where the penalty for noncompliance ultimately may be loss of Federal funding.

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[1](...continued)
education programs, added by 46 F.R. 5460 (January 19, 1981); (2) two official "Policy Interpretations" — one concerning use of insurance proceeds, adopted in 45 F.R. 86390 (December 30, 1980) and the other discussing catheterization as a related service, proposed but postponed, 46 F.R. 25614 (1981); and (3) bulletins from BEH's Division of Assistance to States ("DAS Bulletins"), of which 112 were issued from 1977 until 1984 when they were superceded by "OSEP Memoranda", which continue to this day. It is noteworthy, *amici* suggest, that the Department used the formal policy making process represented by all of these documents to address subjects far more clearly within the scope of its authority than the subject matter of this proceeding.

[2] The background of the "New Letter" is described in petitioner's brief at page 3 and is reprinted there in Appendix E., page 39a.

SUMMARY OF THE ARGUMENT

This case raises important and fundamental questions about the power of any Department or agency of the Executive Branch, in the absence of statutory authority, to impose new obligations upon State or local governments. The Department contends that its authority is found in IDEA/B, a statute enacted to assure students with disabilities their access to a "free appropriate public education" and to due process in protecting that access. It is only those four quoted words the Department cites in support of its conclusion in the New Letter. The Department also maintains that its conclusion is supported by this Court's decision in *Honig v. Doe*, 384 U.S. 305 (1984). But the Department's own previous statements and actions conclusively demonstrate that it does not have the statutory authority to issue the New Letter. In issuing the New Letter, the Department clearly violated Congressional restrictions imposed by IDEA/B, § 1417(b); it also blatantly disregarded the procedures that OSERS declared it would follow in enunciating policy on discipline of students with disabilities. This Court's intervention is required at this stage because available administrative and judicial remedies are inadequate to resolve the conflict between the circuits on the substantive issue underlying this dispute. The Department has attempted, in issuing the New Letter, to resolve this conflict by imposing its policy preference without the formal rulemaking process Congress envisioned. Given the serious risk of financial sanctions for not complying with a newly stated policy, few state or local education agencies are likely to challenged it openly by refusing to comply.

ARGUMENT

I. THE DEPARTMENT'S OWN PREVIOUS STATEMENTS AND ACTIONS CONCERNING SUSPENSION AND EXPULSION, THIS COURT'S DECISION IN *HONIG v. DOE*, AND THE DEPARTMENT'S PREVIOUS INTERPRETATION OF THAT DECISION DEMONSTRATE THAT THE DEPARTMENT DOES NOT HAVE THE STATUTORY AUTHORITY TO ISSUE THE NEW LETTER.

The Seventh Circuit, noting that the distinction between interpretive and substantive rules is "admittedly far from crystal-clear," held that the New Letter was interpretive because the Department said it was interpretive.[3] Certainly the Department's characterization of its own letter is entitled to some weight.[4] However, where, as here, the Department "interprets" statutory language of such broad or vague scope as "free appropriate public education," a court should be vigilant in determining the basis for the Department's interpretive authority.[5] Additionally, the Department's characterization should be viewed with some skepticism where previous Departmental actions bespeak a great deal of uncertainty about its authority to make policy in this area.

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[3] "Basically, then, this test returns us to the starting point set forth by the District of Columbia Circuit — what kind of rules does the agency think it has promulgated?" 969 F.2d 485 at 490.

Whether the New Letter is ultimately determined to be "legislative" or "interpretive" is of little consequence to education agencies because the practical result is the same: they must either comply with the policy enunciated in the letter or risk termination of Federal funding.

[4] *National Solid Waste Management Ass'n v. EPA*, 27 Env't Rep. Cas. (BNA) 1566 (D.C. Cir. Oct. 27, 1987), as noted in Anthony, Robert A., "Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them to Bind the Public?," 41 DUKE LAW JOURNAL 1311 (No. 6, June 1992) at 1318, fn. 25.

[5] Anthony, Robert A., "'Well, You Want the Permit, Don't You?', 44 ADMINISTRATIVE LAW REVIEW 31, 40 (1992).

The fact is that the record is replete with past actions and statements by OSERS clearly indicating the Department's uncertainty about what, if anything, Congress intended about suspension and expulsion and the scope of its authority on this issue. These actions and statements also document that the Department has considered the existence of a nexus between a student's disability and his misconduct to be a material factor in determining appropriate disciplinary action. These indications include the following actions and statements.

1. In April 1980, the Department of Justice filed an *amicus* brief on behalf of the Department of Education in *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981) (Unit B), the first decision addressing disciplinary questions under IDEA, where it urged, *inter alia*, that a student with disabilities could not be suspended or expelled without prior individual determination of whether there was relation between misconduct and disability. There would be no point in urging this prior determination if the distinction was not crucial to determining appropriate disciplinary procedures.

2. Later that same year, in Final Report to the Secretary of the Task Force on Equal Educational Opportunity for Handicapped Children (October 15, 1980), the Secretary of Education was advised:

> "*Suspension and expulsion of handicapped children.* OSE and OCR have each prepared decision memoranda and documents proposed for publication in the Federal Register for your review. Efforts are now under way to develop a joint decision memorandum and documents for publication in order to facilitate a well-informed and speedy publication process."[6]

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[6] *As reprinted in* 1980-81 EHLR DEC., Analysis and Comment, Issue 35 (October 31, 1980), p. AC67 at p. AC74,

Presumably this reflects a belief that utilizing the formal rulemaking process was required for the exercise of the Department's authority.

3. Shortly thereafter, in its "Notice of intent to develop regulations, interpretive rules or policy statements," the Department explicitly stated:

> **"G. Suspension and Expulsion**
>
> "Current EHA-B and Section 504 regulations do not provide complete guidance on the extent to which school authorities are permitted to discipline handicapped children by suspending or expelling them from school. In a legal brief submitted as a friend of the court in *S-1 v. Turlington* (5th Cir. April, 1980), the Department took the position that expulsion of handicapped students without a prior, individual determination of the relationship between a student's misconduct and (1) his or her handicap; or (2) any inappropriate placement violated EHA-B and Section 504.
>
> "1. Where a determination has been made that a handicapped student's behavior is not related to his or her handicap or any inappropriate placement, under what circumstances, if any, are long-term exclusions permissible?"[7]

This constitutes still further evidence of the Department's concern that the bare text of the law might not be sufficient to enunciate policy in interpretive letters and about the scope of its authority on this issue.

4. Still later, an OSERS "Briefing Paper" implementing the Reagan Administration's effort to vastly reduce the number

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[7] 45 Federal Register 8502 (December 24, 1980).

and scope of Federal regulations,[8] in a specific discussion of suspension and expulsion questions, stated that from litigation to date:

> "It is not entirely clear from these decisions whether a handicapped child is absolutely shielded from long-term suspensions or expulsions regardless of whether there is any relationship between the handicap and the behavior."[9]

5. The same paper suggested, as a possible course of action to resolve questions concerning suspension and expulsion, that the Comment to Reg. 300.513 be deleted and the following subparagraph (3) be added:

> "(3) The public agency determines expressly, based upon professionally acceptable criteria, such change is necessary for disciplinary reasons, where the misconduct underlying the discipline is not a manifestation of the child's handicap."[10]

This is an explicit statement by the Department that the existence of a nexus between a student with disability's misconduct and his disability could be a critical factor in determining the appropriate disciplinary procedure.

6. Finally, there is the reference discussed by the Seventh Circuit,[11] in which OSEP responded to the question: "What are

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[8] Presidential Executive Order 12291 (January 29, 1981), 46 Fed. Reg. 13193 (February 17, 1981).

[9] *As reprinted in* 1981-82 EHLR DEC., Analysis and Comment, Issue 57 (October 2, 1981), p. AC188, at p. AC210.

[10] *Id.* at Par. 4, (4).

[11] *Metropolitan School District of Wayne County, Indiana v. Davila*, 969 F.2d 485 at 491 (7th Cir. 1992).

the issues and requirements related to suspension and expulsion?" OSEP stated:

> "Some courts looking at the discipline issue under both EHA-B and Section 504 have said that, when the misbehavior is unrelated to the handicapping condition, the child can be disciplined without regard to the fact that the child has a handicap. This is of interest because *the basis for this under EHA-B is not entirely clear.*"[12]

There could hardly be a clearer expression of the vagueness of the statute by an administering agency.

Despite its finding the New Letter to be "interpretive," the Seventh Circuit explicitly stated that this Court's decision in *Honig v. Doe*, 384 U.S. 305 (1984), "did not reach th[e] issue" addressed in the Letter.[13] In addition, *Honig* does not provide a basis for the New Letter for the following additional reasons.

First, *Honig* involved the disciplinary procedures followed regarding two students with disabilities where there was no question about the relationship of the students' misconduct and their disabilities.[14] The Ninth Circuit in that case properly found that IDEA prohibits the expulsion of students with disabilities for misbehavior that is a manifestation of their disabilities, *i.e.*, where there is a nexus. However, the Ninth Circuit also also ruled that the opposite result is required where no nexus is present:

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[12] OSEP Memorandum 87-21, Question 7, reproduced at EHLR 202:371 (emphasis supplied).

[13] 969 F.2d at 493.

[14] This Court stated that the students in *Honig* had exhibited "dangerous or disruptive conduct growing out of their disabilities." *Honig*, note 13, *supra*, at 308.

> "If the child's misbehavior is properly determined *not* to be a manifestation of his handicap, the handicapped child can be expelled. ... This conclusion does not conflict with the [IDEA]. When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. Therefore, when a handicapped child is properly expelled, the school district may cease providing all educational services — just as it could in any other case. To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that that is not so."

Doe v. Maher, 793 F.2d 1470, 1482 (9th Cir. 1986) [footnote and citations omitted].

This question was not directly addressed by this Court in *Honig*; accordingly *Honig* provides no basis for the Secretary's interpretation in the New Letter.

Second, the Secretary's reliance upon this Court's decision in *Honig* for its conclusion in the New Letter is erroneous because that decision was concerned about *unilateral* disciplinary action by schools, sanctions imposed in disregard of IDEA's procedural safeguards.[15] In fact, this Court expressly stated in *Honig* that neither the "structure [n]or legislative history [of IDEA] provide any guidance as to how the the term [change in placement] applies to fixed suspensions."[16] Even the Secretary's own characterization in the New Letter of this Court's decision in *Honig* reflects this limited reading:

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[15] "As the [IDEA's] legislative history makes clear, one of the evils Congress sought to remedy was the *unilateral* exclusion of disabled children by *schools*, ..." *Honig*, note 13, *supra*, at 325 [first emphasis supplied].

[16] *Honig v. Doe*, note 13, *supra*, at 326, fn 8.

> "The EHA-B has been found by the U.S. Supreme Court in its decision in *Honig v. Doe* [citation omitted], to prohibit State or local school authorities from *unilaterally* excluding children with handicaps ..."[17]

Third, the Seventh Circuit erroneously accepted the Department's assertion, by counsel during oral argument, that until the *Honig* decision, "it was unclear whether disabled children could be disciplined at all under the Act."[18] The regulations initially proposed to implement what is now IDEA provided, *inter alia*, that a student's placement must remain unchanged pending any proceeding regarding that placement.[19] However, before adopting the final regulations, the Department added the following comment:

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[17] New (OSEP 1989), EHLR 213:258 (emphasis supplied). Soon after the *Honig* decision was handed down, OSERS responded to concerns about its impact by stating that:

> "...this is not a case where the Court prevents schools from acting in the best interests of all children. Rather, the Supreme Court followed an explicit statutory provision and held that, when pursuing a drastic solution such as a long suspension or expulsion of a handicapped child, a school district *must follow the orderly process* prescribed in the [IDEA]."

Emerson (OSEP 1988), EHLR 213:146, 213:147 [emphasis supplied]. This emphasis on process, repeated in the New Letter, is the more accurate interpretation of *Honig*, and thus provides no support for the Department's ultimate conclusion.

[18] 969 F.2d at 491.

[19] Proposed Pub.L. 94-142 Regulations, 41 Fed. Reg. 56965 (December 30, 1976), at Reg. § 121a.413, 41 Fed. Reg. 56990-91; this regulation is now found at 34 C.F.R. § 300.513.

> "While the placement may not be changed, this does not preclude the agency [school district] from using its normal procedures for dealing with children who are endangering themselves or others."[20]

In its analysis of the final regulations, the Department explained:

> "A comment has been added to make it clear that this section would not preclude a public agency from using its regular procedures for dealing with emergencies."[21]

Inasmuch as a school district's "regular procedures" for dealing with emergencies must include its disciplinary procedures, obviously the Department has believed from the very beginning that students with disabilities can be subjected to <u>some</u> disciplinary actions.

II. THE NEW LETTER WAS ISSUED CONTRARY TO CONGRESSIONAL DIRECTION THAT IDEA/B BE IMPLEMENTED ONLY THROUGH THE FORMAL RULEMAKING PROCESS AND IN DISREGARD OF THE PROCEDURES OSEP ASSURED IT WOULD FOLLOW.

The Seventh Circuit found that IDEA, 20 U.S.C. § 1417(b) "was designed to ensure that the rules necessary to implement the Act would be in place early enough to allow states to fulfill their statutory obligations by the effective date of the Act." 969 F.2d at 494. It also observed that the Department's delegated legislative authority, and its exercise of that authority, does not remove the Department's inherent authority to issue interpretive rules. It concluded that the provision "authorizes

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[20] *Ibid.*

[21] APPENDIX A — ANALYSIS OF FINAL REGULATION (45 CFR PART 121A) UNDER PART B OF THE EDUCATION OF THE HANDICAPPED ACT, 42 Fed. Reg. 42474, 42495 (August 23, 1977).

legislative rulemaking, it does not revoke interpretive authority." *Id.* This construction not only ignores the plain language of the statute; it also ignores the historical concerns that motivated Congress to impose the stated dual mandates upon the Department.

To be sure, in enacting § 1417(b), Congress was concerned that implementing regulations be timely adopted.[22] This concern stemmed from the reluctance of the then-Department of Health, Education and Welfare to formally adopt regulations implementing § 504 of the Rehabilitation Act of 1973, a statute whose history has been intertwined with IDEA from the enactment of each.[23] It is crucial to recall that

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[22] This fear was well grounded. For one thing, the legislation was opposed by the Department. See Statement of Frank C. Carlucci, Undersecretary of Health, Education and Welfare, before the Senate Subcommittee on the Handicapped, Committee on Labor and Public Welfare (June 17, 1974). Apparently Congress' skepticism required then-Secretary Caspar Weinberger to provide assurances:

> "Legislation passed by the Congress in the past two years gives the Executive Branch authority to enforce both the elimination of all discrimination against the handicapped in Federally assisted programs and activities (Section 504 of the Vocational Rehabilitation Act of 1973) and specific requirements for approving State plans to provide special education (Sections 612 and 615 of the Education Amendments of 1974).
>
> "I want to emphasize that both the Department and the Office of Education are taking these responsibilities seriously. Regulations to ensure state compliance with these statutes will be issued in the near future."

Letter from Caspar Weinberger, Secretary, Department of Health, Education and Welfare, to Senator Hugh Scott (R-Pa.) (June 9, 1975), Congressional Record S.10334-5 (June 11, 1975). But there were other grounds for concern. See *infra* text and footnotes 24, 29.

[23] Though § 504 of the Rehabilitation Act was enacted in 1973, no regulations had been implemented when Congress was considering the

(continued...)

although § 504 preceded IDEA by two years, final regulations were not adopted until 1978[24]; by contrast, because of IDEA §1417(b), implementing regulations for that statute were effective in 1977.[25]

Similar Congresssional apprehensions underlie the second sentence of § 1417(b): "No other less formal method of implementing such provisions is authorized." Congress was familiar with, and concerned by, the Department's history of administering a "sister" statute on an informal basis. For this reason, it imposed the highest standards of formality upon the Department of Education in adopting and amending policy stated in IDEA. Moreover, in construing this statute, this Court is bound to honor an express limitation on an agency's rulemaking authority.[26]

In addition, OSEP is attempting to impose burdensome, new obligations without following the procedures it committed

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[23](...continued)
legislation that became Pub.L. 94-142, or EHA, now IDEA, in 1974 and 1975, raising doubts among advocates for persons with disabilities that the statute would ever be enforced. Issuance of proposed regulations only followed nationwide demonstrations, a lawsuit, *Cherry v. Mathews*, 419 F.Supp. 922 (D. D.C. 1976), and finally Presidential Executive Order No. 11914 (April 24, 1976), 41 Fed. Reg. 17871.

[24] 43 Fed.Reg. 2132 (January 13, 1978).

[25] 42 Fed. Reg. 42473 (August 23, 1977). Originally codified at 45 C.F.R. Part 121a, the pertinent regulations are now found at 34 C.F.R. Part 300.

[26] § 1417(b) is not the only instance Congress expressed its concern about the procedures followed by the Department in implementing IDEA. In 1983, in response to the "de-regulation" initiative undertaken by the Reagan Administration, Congress added § 1407. This provision (a) extends the Congressional comment period under 20 U.S.C. § 1232(b) from 30 to 90 days and (b) bars the Secretary of Education from adopting any regulation that would lessen protections of IDEA "except to the extent that such regulation reflects the clear and unequivocal intent of the Congress in legislation." 20 U.S.C. §1407, as added by Pub.L. 98-199, Sec. 6, Dec. 2, 1983, 97 Stat. 1359.

itself to following. The Seventh Circuit referred to, misconstrued and, therefore, gave little weight to a formal document previously issued by OSEP in which it adopted a position contrary to that stated in the New Letter and stated it would not change without following certain procedures. In OSEP Memorandum 87-21, Question 7,[27] OSEP stated:

> "While this [issue, whether a child can be disciplined without regard to handicap where misbehavior is unrelated to the handicap] may deserve further thought, *OSEP will not apply a rule or guideline contrary to this in the absence of a generally applicable statement distributed in advance to the States.*" (emphasis supplied).

This assurance was ignored by issuance of the New Letter.

OSEP's position was not clarified when, subsequently, it advised SEAs about the standards it would use in reviewing state plans. The New Letter was issued on September 15, 1989. In February 1991, OSEP distributed the draft review checklist it would use for state plans effective for Fiscal Years 1992-94.[28] The state plan review checklist is the monitoring document OSEP staff use when reviewing state plans to determine if they comply with the requirements set forth in IDEA/B. The checklist contains no reference to the position stated in the New Letter, despite the advance planning that would be required for LEAs and SEAs to provide needed assurances.[29]

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[27] Note 12, *supra*.

[28] OSEP Memorandum 91-15 (February 20, 1991).

[29] The arbitrary nature of emunciating and implementing policy in this manner is illustrated by the experience some states have had since the New Letter was written. Although no documentation is available, some of the states whose plans were being reviewed during the last fiscal year were advised as follows concerning the issues of suspension and expulsion: if the state plan contains any statements regarding discipline, it must include a reference to the New Letter or to policies implementing the New Letter; if the state plan (continued...)

Although the position taken by OSEP in the New Letter is directly contrary to the position taken in Memorandum 87-21, OSEP did not notify state directors of education, the state-level persons primarily responsible for overseeing compliance with IDEA/B, either by generally distributing the New Letter to them or by including notice of its change of position in the state plan review checklist, the purported purpose of which was to assist them in compliance. This is exactly the kind of "hip pocket" policy making Congress intended to prohibit in enacting Section 1417(b).[30]

III. OSERS IS ATTEMPTING AN ADMINISTRATIVE RESOLUTION OF AN IMPORTANT ISSUE ABOUT WHICH THERE IS A CONFLICT AMONG THE CIRCUITS.

This Court should grant the petition for certiorari because the policy enunciated in the New Letter establishes precedent for education agencies about which there is a conflict among the circuits. See *Rules of the Supreme Court*, Rule 10.1(a).

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[29](...continued)
contains no statements about discipline, any reference to the New Letter is unnecessary.

[30] The concern that the Department might force compliance with its wishes simply by withholding funds was expressed during committee hearings:

> "In addition, the National School Boards Association was concerned that unless the compliance office was separate from the program office (either federal or state depending on how the law is drafted), there may be a tendency by the program office to informally turn to unintended means of seeking compliance (*e.g.*, a slow-down in releasing funds)."

Memorandum to Ray Peterson, Council of Chief State School Officers, and Fred Weintraub, CEC, from Mike Resnick, National School Boards Association, on "Forthcoming Handicapped Legislation" (April 1, 1975), p. 3; submitted as Appendix B to Statement by August W. Steinhilber, Assistant Executive Director, Office of Federal Relations, National School Boards Association, on Education of the Handicapped Legislation before the Select Committee on Education, House Committee on Education and Labor (April 10, 1975).

The New Letter is an attempt by the Department of Education to impose an administrative interpretation of IDEA/B, not only in disregard of the restrictions imposed by Congress,[31] as noted above, but in circumvention of the judicial system.[32] If this attempt succeeds, it is highly unlikely that either an SEA or LEA will jeopardize its Federal funding by litigating the underlying substantive issue to resolution.

Despite this Court's previous ruling in *Honig*, there is no settled law within IDEA concerning the discipline of a student with disabilities where there is no nexus between the student's misconduct and the disability. Contrary to the Ninth Circuit's decision in *Doe v. Maher*, which held that educational services can be terminated where no nexus exists, discussed *supra*, p. 9, state and local special education administrators in the Fifth and Eleventh Circuits follow the decision in *S-1 v. Turlington*, 635 F.2d 342 (5th Cir.) (Unit B), *cert. denied*, 454 U.S. 1030, and the decision in *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982), which hold that services cannot be terminated under any circumstances.

The New Letter represents an attempt by the Department to make substantive policy[33] on this issue without "offer[ing]

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[31] Congress has directed that "any rules, regulations, guidelines, interpretations, orders, or requirements of general applicability prescribed by the [Department of Education]" comply with the rulemaking procedures of 5 U.S.C. § 553. 20 U.S.C. § 1232(a)(1) (1988).

[32] The potential importance of this correspondence is underscored by this Court's deference to a similar letter in *Honig*. Note 13, *supra* at 484, fn. 8.

[33] The Department's position seems to be based on its interpretation that IDEA's guarantee of FAPE was intended to ensure programming for a student with disabilities regardless of the student's behavior. Perhaps so, but that was not the obvious thrust of Pub.L. 94-142, the statute that first created the Part B grant program under IDEA. As the legislative sponsors, the legislative history and legislative supporters stated time and again, the objectives of Pub.L. 94-142 were to guarantee access to a public education and to assure appropriate educational programming. None of these sources, let alone the statute and implementing regulations themselves, contain one word about disciplinary procedures. Given this uncertainty, it requires an eye far more discerning than

(continued...)

the opportunity for public comment which is normally afforded during the notice-and comment legislative rulemaking process for rules which have the force of law."[34] The Department is subject to the procedural prerequisites of the Administrative Procedure Act in enunciating new policy. 5 U.S.C. § 553. As such, it should have given general notice of the substantive policy contained in the New Letter, as well as an opportunity for public comment.

OSEP's writing of the New Letter most closely resembles similar action by the Chief of the Guaranteed Student Loan Branch of the Department of Education, who responded by letter to an inquiry from the New York State Higher Education Services Corporation.

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[33](...continued)
amici's to discover the gossamer-like nexus between the guarantee of FAPE and OSEP's conclusion in the New Letter. *Amici* agree that Congress intended, as this Court stated in *Honig v. Doe*, to preclude unilateral exclusions of students with disabilities. But since this is a far different result from requiring the continuation of educational programming once it has been determined that the student's misconduct is not related to the disability, *amici* suggest that this is precisely the type of issue for which the formal rule-making process was intended.

[34] The Administrative Conference of the United States has adopted Recommendation 92-2 (June 18, 1992), to be codified at 1 C.F.R. § 305.92.2, which, *inter alia*, urges agencies to make clear that policy statements of general applicability are not binding. Recommendation II., *Policy Statements*, A. "Notice of Nonbinding Nature." The text of the Conference's Recommendation 92-2 is attached to this Brief as Appendix A.

The Administrative Conference has previously urged agencies to use notice-and-comment procedures, where possible, before promulgating an interpretive rule of general applicability or statement of general policy that is likely to have substantial impact on the public. *See* Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy," 1 C.F.R. § 305.76-5.

Agencies' widespread use of policy statements to bind the public and the implications for administive law generally are discussed and analyzed in Anthony, note 4, *supra*.

> "Although the author of the letter spoke of it as an 'interpretation,' it would seem difficult to point to specific language in the statute that could yield so detailed an interpretation. The threatened sanction compelled compliance by the lending institute, although legislation was not used."

Anthony, note 4 *supra*, at 1342. It is instructive, moreover, that the GSLB letter stated that agency's intention to include its policy in a future notice of proposed rulemaking and admitted "that this Departmental interpretation is of sufficient general interest and importance that all guarantee agencies should be made aware of it. To that end, we are providing a copy of this letter to the National Council of Higher Education Loan Programs, which we have asked to distribute this guidance to its members." *Id.* The policy was included in a subsequent notice of proposed rulemaking,[35] but has not yet been adopted. No similar acknowledgement or steps have been taken by the Department regarding the New Letter. Rather, OSERS reaffirmed its position in a subsequent letter, further stating its "expect[ations] that all States will comply with this requirement." Letter to Ellison Smith, Chairman, SCASS Federal Legislative Committee, from Robert R. Davila, Assistant Secretary, OSERS (January 31, 1992), *as reprinted in* 18 INDIVIDUALS WITH DISABILITIES EDUCATION LAW REPORT 685, 686.[36]

The availability of judicial review, the traditional means to require agency observance of proper rulemaking procedures, is neither efficient, equitable nor, in this situation, likely. Directly contesting Departmental policy can place the challenger in a position of financial jeopardy. Few, if any, state or local education agencies can afford to loose the millions of dollars in Federal funding that might be jeopardized while contesting the

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[35] 55 Fed. Reg. 48,324 (November 20, 1990)

[36] The text of this letter is reproduced in the Appendix beginning at page 7a.

Department's administrative process. *Rogers v. Bennett*, 873 F.2d 1387 (11th Cir. 1989); *Freeman v. Cavazos*, 923 F.2d 1434 (11th Cir. 1991). Accordingly, without this Court's intervention, the Department likely will succeed in its effort to impose an administrative resolution to this important issue of public policy.

CONCLUSION

For the above stated reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 28, 1993

APPENDIX

RECOMMENDATION 92-2:[*****] AGENCY POLICY STATEMENTS[******]

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

This recommendation addresses use of agency policy statements. Policy statements fall within the category of agency actions that are "rules" within the Administrative Procedure Act's definition because they constitute "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or describe law or policy," 5 U.S.C. § 551(4). "Rules" include (a) legislative rules, which have been promulgated through use of legislative rulemaking procedures, usually including the notice-and-comment procedures of the Administrative Procedure Act, 5 U.S.C. §553, and (b) nonlegislative rules — that is, interpretive rules and policy statements — which fall within the above definition of "rules" but which are not required to be promulgated through use of legislative rulemaking procedures. Thus, policy statements include all substantive nonlegislative rules to the extent that they are not limited to interpreting existing law. They come with a variety of labels and include guidances, guidelines, manuals, staff

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[*****] As reproduced in Anthony, Robert L., "Interpretive Rules, Policy Statements, Guidances, Manuals and the Like — Should Federal Agencies Use Them to Bind the Public?, 41 DUKE LAW JOURNAL 1311, 1381 (June 1992).

[******] The Administrative Conference of the United States adopted Recommendation 92-2 on June 18, 1992. This text is reprinted from an advance copy of the recommendation provided to the *Duke Law Journal* by Professor Robert A. Anthony. It will be codified at 1 C.F.R. §305.92-2. It has been edited only to conform to the Duke Law Journal's citation conventions.

instructions, opinion letters, press releases or other informal captions.

Policy statements that inform agency staff and the public regarding agency policy are beneficial to both. While they do not have the force of law (as do legislative rules) and therefore can be challenged within the agency, they nonetheless are important tools for guiding administration and enforcement of agency statutes and for advising the public of agency policy.

The Conference is concerned, however, about situations where agencies issue policy statements which they treat or which are reasonably regarded by the public as binding and dispositive of the issues they address.[1] The issuance of such binding pronouncements as policy statements does not offer the opportunity for public comment which is normally afforded during the notice-and-comment legislative rulemaking process for rules which have the force of law. Courts have frequently overruled agency reliance on policy statements as binding on affected persons.

Where the policy statement is treated by the agency as binding, it operates effectively as a legislative rule but without the notice-and-comment protection of § 553. It may be difficult or impossible for affected persons to challenge the policy statement within the agency's own decisional process; they may be foreclosed from an opportunity to contend that the policy statement is unlawful or unwise, or that an alternative policy

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[1] There are many facets that must be assessed in determining whether a policy statement is operationally a rule that binds affected persons. In general, we apply the concept here to agency statements that are usually issued in permanent form and that are relied upon by an agency and its staff to decide policy whose basis, legality, and soundness cannot be challenged within the agency. Whether a statement is a matter of policy or interpretation, is issued in a permanent form, and is in fact binding (or to what extent it is binding) are often difficult questions that can only be decided in context.

should be adopted. Of course, affected persons could undergo the application of the policy to them, exhaust administrative remedies and then seek judicial review of agency denials or enforcement actions, at which time they may find that the policy is given deference by the courts. The practical consequence is that this process may be costly and protracted, and that affected parties have neither the opportunity to participate in the process of policy development nor a realistic opportunity to challenge the policy when applied within the agency or on judicial review. The public is therefore denied the opportunity to comment and the agency is denied the educative value of any facts and arguments the party may have tendered.

The Conference believes this outcome should be avoided, first by requiring that when an agency contemplates an announcement of substantive policy (other than through an adjudicative decision), it should decide whether to issue the policy as a legislative rule, in a form that binds affected persons, or as a nonbinding policy statement.[2] Second, to prevent policy statements from being treated as binding as a practical matter, the recommendation suggests that agencies establish informal and flexible procedures that allow an opportunity to challenge policy statements. Recognizing that each agency's process differs, the choice of which procedures to change in implementing this recommendation remains in the discretion of each agency. Likewise, actions taken during review of the policy statement would not necessarily be affected by such reconsideration.

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[2] The Conference has already urged agencies to use notice-and-comment procedures, where possible, before promulgating an interpretive rule of general applicability or statement of general policy that is likely to have substantial impact on the public. Agencies were urged to use postpromulgation notice-and-comment procedure if it is not practicable to accept and consider comments before the rule is promulgated. *See* Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy," 1 C.F.R. § 305.76-5.

RECOMMENDATIONS

The following recommendations applicable to policy statements are intended to ensure that, before an agency promulgates substantive policies which bind[3] affected persons, it provides appropriate notice and opportunity for comment on such policies, and makes sure that policy statements are not treated as binding.

I. *Legislative Rulemaking for Binding Policies*

A. Agencies should not issue statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative rulemaking procedures (normally including notice-and-comment). Specifically, agencies should not attempt to bind affected persons through policy statements.

B. When an agency publishes a legislative rule (e.g., in the Federal Register and in official agency publications), the preamble to the rule should state that it is a legislative rule intended to bind affected persons. The preamble should also cite the specific statutory authority for issuing the rule in binding

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[3] As the term is used here, an agency ruling is "binding" when the agency treats it as a standard where noncompliance may form an independent basis for action in matters that determine the rights and obligations of any person outside the agency. This is true whether or not the rule was promulgated in accordance with § 553. A document that was not issued pursuant to § 553, and therefore cannot be binding legally, may nevertheless be binding as a practical matter if the agency treats it as dispositive of the issue it addresses. This recommendation is concerned only with substantive, as opposed to procedural, rules. *See* Recommendation 92-1, "The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements" (to be codified at 1 C.F.R. § 305.92.1).

form as well as the steps that it has taken to comply with procedural requirements.

II. *Policy Statements*

A. *Notice of Nonbinding Nature.* Policy statements of general applicability should make clear that they are not binding. Persons affected by policy statements should be advised that such policy statements may be challenged in the manner described in part B below. Agencies should also ensure, to the extent practicable, that the nonbinding nature of policy statements is communicated to all persons who apply them or advise on the basis of them, including agency staff, counsel, administrative law judges, and relevant state officials.

B. *Procedures for Challenges to Policy Statements.* Agencies that issue policy statements should examine and, where necessary, change their formal and informal procedures, where they already exist, to allow as an additional subject requests for modification or reconsideration of such statements. Agencies should also consider new procedures separate from the context in which the policy statement is actually applied. The procedures should not merely consist of an opportunity to challenge the applicability of the document or to request waivers or exemption from it; rather, affected persons should be afforded a fair opportunity to challenge the legality or wisdom of the document and to suggest alternative choices in an agency forum that assures adequate consideration by responsible agency officials. The opportunity should take place at or before the time the policy statement is applied to affected persons unless it is inappropriate or impracticable to do so. Agencies should not allow prior publication of the statement to foreclose full consideration of the positions being advanced. When a policy statement is subject to repeated challenges, agencies should consider instituting legislative rulemaking proceedings on the policy.

III. *Instructions to Agency Staff*

This recommendation does not preclude an agency from making a policy statement which is authoritative for staff officials in the interest of administrative uniformity or policy coherence. Indeed, agencies are encouraged to provide guidance to staff in the form of manuals and other management directives as a means to regularize employee action that directly affects the public. However, they should advise staff that while instructive to them, such policy guidance does not constitute a standard where noncompliance may form an independent basis for action in matters that determine the rights and obligations of any person outside the agency. Further, agencies are encouraged to obtain public comment on such guidance. Finally, in any case in which staff officials' adherence to such directives may affect a member of the public, care should be taken to observe the requirements of 5 U.S.C. § 552(a) which imposes a publication requirement independent of any obligation to employ notice-and-comment procedures.

TEXT OF LETTER FROM
ROBERT R. DAVILA, ASSISTANT SECRETARY, OSERS,
TO
MR. ELLISON SMITH, CHAIRMAN
SCASS FEDERAL LEGISLATION COMMITTEE

as reprinted in

18 INDIVIDUALS WITH DISABILITIES EDUCATION
LAW REPORT 685

January 31, 1992

Mr. Ellison Smith
Chairman
SCASS Federal Legislation Committee
421 Zimalcrest Drive
Columbia, SC 29210

Your letter to Secretary of Education Lamar Alexander, dated November 27, 1991, has been referred to the U.S. Department of Education's Office of Special Education and Rehabilitative Services (OSERS) for my response. You ask whether, absent a court order, the State of South Carolina must continue to provide a free appropriate public education (FAPE) to children with disabilities who, after full due process, are expelled from the public school districts within the State.

It is OSERS' position that States receiving funds under Part B of the Individuals with Disabilities Education Act (Part B), are required to provide FAPE to all eligible children within the State — including those who have been duly suspended or expelled for misconduct unrelated to their disabilities. This requirement is not driven by whether the State is subject to a court ruling. OSERS' position is based on the language of Part B, its legislative history and the judicial precedents we find most persuasive. Accordingly, OSERS expects that all States that receive Part B funding, including South Carolina, will comply with this requirement.

OSERS would not require a specific assurance concerning the provision of services to a child with a disability who has been expelled under these conditions, unless it had reason to believe, as occurred in OSERS' review of South Carolina's State Plan, that a State did not plan to provide these services. This may account for the different responses you have received when discussing this requirement with other superintendents.

I hope that you find this information responsive to your inquiry.

Robert R. Davila
Assistant Secretary